Mag 25

Application for Stay by reason of breach of reasonable time requirement under Art 6(1) of the Convention on Human Rights; whether the relevant period commenced only upon service of the summonses; whether a stay of proceedings was the appropriate remedy.

F. B. NOLAN CHIEF INSPECTOR Complainant PATRICIA MARION COOPER Defendant F. B. NOLAN CHIEF INSPECTOR Complainant SAMUEL ERNEST COOPER Defendant	Petty Sessions District of Newry and Mourne County Court Division of Armagh and South Down

Ruling on Defendants' Applications;
To Stay Proceedings on grounds of breach of Right to Trial Within a Reasonable Time

On 10th December 2002 I handed down my written reasons for dismissing the applications by both defendants for a stay of these proceedings on the grounds of abuse of process at common law. In summary, I had determined that there was such abuse of process, in the sense that there had been a manipulation of the process, more particularly by delaying the issue and service of the summons against each defendant. However, this could not be treated, in law, as an abuse arising from an antecedent act, so that the remedy of a stay for an abuse occasioning delay was not available where it was not contended that the prospect of a fair trial had thereby been prejudiced.

In accordance with the agreement previously reached between the parties, one was then to move on, in those circumstances, to consider separately the further application by each defendant that there had been a breach of the right to a hearing within a reasonable time, pursuant to Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as now incorporated into our domestic law under The Human Rights Act 1998, and which warranted a stay.

The proper approach to such an enquiry was enunciated at para. 52 of Bingham, L's judgment in Procurator Fiscal, Linlithgow v Watson and Burrows; H.M. Advocate v JK Privy Council[1], delivered on 29th January 2002. I do not propose to reiterate it at length here.[2] For present purposes I restate the preliminary ruling contained in my written reasons of 10th December 2002[3] in this matter;

> Given that, in addition, these prosecutions have yet to come to trial, getting on for 3 years since detection, there is, on the face of it, and without detailed enquiry, a real cause for concern that the right of each Defendant to a trial within a reasonable time may have been abrogated.

It was not conceded by the prosecution that the relevant period, the subject of this enquiry, constituted a breach of the reasonable time requirement. To echo the words of Campbell, LJ in R v Fegan & Ors. (unreported judgment of 26th June 2001)[4],

> Before I make any decision as to the reasonableness of the length of the proceedings against Mr Fegan and Mr Rooney I shall give the Crown an opportunity to provide such further information as may be advised on the progress of the investigation.

It was also contended on behalf of the prosecution that the relevant period, for the purposes of the reasonable-time enquiry, was the service of the summons on each defendant, on or about 16th August 2001. In R v Murphy (unreported judgment of 20th December 2001), Gillen, J reasoned[5];

> I am not persuaded that the reasoning in this regard in *Attorney General's Reference (No 2)*[6] is flawed. Each case will depend upon its own facts and whilst it is easy to envisage a not insubstantial number of exceptions to the general rule, I believe that in the ordinary way interrogation or interview of a suspect by itself will not amount to a charging of that suspect for the purpose of the reasonable time requirement in art 6(1). In the present case the defendant was interviewed in the Republic of Ireland with reference to offences which that jurisdiction might wish to prefer against him. In the event he was not charged in the Republic of Ireland arising out of these matters. I see nothing in these circumstances that would bring these interviews within the definition of an official notification that he had committed a criminal offence at least within Northern Ireland. In my view the logical time in this instance when that

[1] Procurator Fiscal, Linlithgow v Watson and Burrows; H.M. Advocate v JK Privy Council DRA No. 1 of 2001
[2] In part because I have already done so in the written reasons I gave in a case of Police v Caskey at Bangor Magistrates' Court on 22nd August 2002, at p.p. 2 and 3.
[3] At p. 2.
[4] *Ibid., p. 11.*
[5] At p. 4
[6] The Attorney's General's Reference (No. 2 of 2001), (2001) 1WLR 1869 at paras. 10, 11 and 13

> definition could arise was when he was charged in March 1998 shortly after his interviews in February 1998. In the event that I am correct in this conclusion, the relevant period to be considered therefore is that between March 1998 and February 2001, which is a period of 2 years and 11 months.

Campbell, LJ also considered the issue in R v Fegan & Ors. (2001). His treatment[7] makes it even more apparent that the point falls to be determined upon the facts of each particular case. The learned Judge agreed that Fegan and Rooney were "charged" when their homes and business premises were searched. Likewise, McCullough was to be treated as "charged" when he knew he was being investigated when Crown counsel so informed a judge, not when he was subsequently arrested for the first time. On the other hand, Patricia McCullough was not "charged" when her husband was arrested, since, on the facts, there was no implication that she was also being investigated for commission of a serious criminal offence. In her case (alone), that only happened when she was arrested on 23rd March 1999.

In the instant case, police attended at Crieve House, Monkshill on 15th March 2000. In light of what they saw there, and acting on information that Mrs Patricia Cooper was the registered herd keeper, Const. Dougan attended at her residence on the evening of that same day. He introduced himself and made her aware of the nature of his enquiries and the discussion at that point seemed to focus upon the need to dispose of the carcasses. Nonetheless, it is apparent from his tendered Statement dated 27th July 2000[8] that the "… nature of my enquiries…" must have included intimation to Mrs. Copper that she was suspected of having committed criminal offences in relation to the presence of animal carcasses on the land at Crieve House, since he went on to record that he pointed out to Mrs. Cooper that she was under an obligation to dispose of the carcasses forthwith "… and that failure to do so was a *further* offence" (*my emphasis*). In any event, on 16th June 2000, he instigated a formal interview of Mrs. Copper, in the presence of her solicitor, at Bangor RUC Station (as it then was), for the purposes of which he administered a formal caution to her, in accordance with Art. 3 of the Police and Criminal Evidence (NI) Order 1998.

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[7] At pp. 5 *et sequi.*

[8] It will be recalled that all parties were in agreement that I was free to address the written documents tendered with the summonses for the purposes of my enquiries, disregarding the fact that the defendants had objected to such documents being tendered in evidence at any trial on the charges without need of formal proof.

In R v Fegan & Ors (2001), Campbell, LJ set out the principles to be applied, as derived from the judgments of the European Court of Human Rights and of national courts[9]. In shortened form, they are as follows;

1. The object is to avoid a person charged remaining too long in a state of uncertainty about his fate.
2. A person is "charged" when his situation has been "substantially affected" by the proceedings. It may also be defined as the point when he is officially notified of an allegation that he has committed a criminal offence.
3. This will usually be the date of arrest or charging, but in some instances it can be some other steps which carry the implication of such an allegation and which likewise substantially affect the suspect's situation.
4. The reasonableness of the length of time involved in the proceedings has to be assessed in each instance according to the particular circumstances. Amongst other things, the court must have regard to;
   (a) the complexity of the case;
   (b) the conduct of the applicant(s);
   (c) the progress of the investigations; and
   (d) the conduct of the judicial authorities.
5. It is not necessary for the defendant to show that prejudice has been or is likely to be caused by the delay;
6. Where prejudice is likely to be occasioned, this will weight heavily in favour of giving priority to the case. In this respect, prejudice is very relevant to reasonableness;
7. The period covered covers the whole of the proceedings, including any appeal;
8. The defendant is not to be blamed for using all remedies available, even if this prolongs delay; and
9. If the defendant is detained in custody, this is a factor to be taken into account in assessing reasonableness.

Applying these precepts, I find as a necessary inference from Const. Dougan's aforementioned Statement that the relevant period in respect of Mrs. Cooper commenced on the evening of 15th March 2000, when he formally notified her that she was under investigation for criminal offences arising from the discovery of carcasses at Crieve House earlier in the day. If I am wrong about that, then the period begins on 16th June 2000, when she was formally cautioned in the presence of her solicitor and shown a video which graphically depicted the full extent of the evidence of cruelty to

[9] At pp. 3 and 4.

livestock and about which it was intended that she be then questioned on suspicion of being the person responsible, as herd keeper.

On either basis, I reject the proposition that Mrs. Cooper can only be deemed "charged" when she was actually served with a summons, twelve months later. Since the fundamental test is as to when the suspect was substantially affected by an allegation, the merest allusion to the efforts made on Mrs. Cooper's behalf from June 2000 onward - specifically aimed at trying to persuade the authorities not to actually instigate criminal proceedings – demonstrate just how much she was substantially affected.

I also have to bear in mind, when resorting to the various authorities on the point, that in the great majority of cases tried summarily there will not have been any occasion upon which the suspect was formally charged. In road traffic cases, for example, the suspect will hear nothing further of the matter from the point at which a police officer tells him, at the roadside, that he will be reporting the matter to his authorities. So long as the suspect has reasonable cause to believe, by reference to the police officer's remarks, that he will be hearing more of the incident by way of a prosecution in the magistrates' court (and sometimes he does not), I would be slow to construe the legal authorities in such a way as to equate only the issue of a summons with the first "official notification" of an allegation that he has committed a summary offence. The authorities usually cited deal more typically with matters involving a formal charge at some point, followed by a remand at the Magistrates' Court with a view to returning him for trial on indictment in the Crown Court. In most cases, I venture to suggest, people who ultimately receive a summons to appear in the Magistrates' Court have normally had cause to expect it for perhaps several months, in light of the remarks made by the police officer at the point of initial investigation. The first principle, in this field, is that people should not remain for too long in a state of uncertainty about their fate. An interpretation of the authorities which construes only the service of a summons, in summary cases, as the commencement of the relevant period, for the purposes of the Convention right to trial within a reasonable time, would fail to address those months of justifiable anxiety for the accused.

What then of the relevant period, so far as Mr. Cooper be concerned? Again, the prosecution contend that the relevant period only commences when he likewise is served with his summons. Unlike his wife, Mr. Cooper did not find himself in a Police Station, embarking upon a formal interview, whether in June 2000 or at any time. In his case, it will be recalled[10], Const. Dougan had made unsuccessful efforts to contact him, for the purposes of

[10] See my Ruling of 10th December 2002 herein, at p. 2

the investigation, before simply chancing upon the man at Monks Hill Road, Newry on 27th July. The constable made Mr. Cooper aware of the nature of his enquiries – "…namely cruelty to animals offences detected on 13 March at Crieve House …and farm at Derryleckagh…". He formally cautioned Mr. Cooper there and then, informed him that he was not under arrest, could leave at any time and was entitled to legal advice.

When Const. Dougan asked if Mr. Cooper understood these rights Mr. Cooper replied that he had been in contact with his solicitor in regard to the matter. That means that Mr. Cooper was already, to some degree, "affected" by the proceedings. He had felt it prudent to take legal advice. I infer from this that he had heard about the events concerning his wife and had anticipated a personal approach from the authorities. Given that the line of defence advanced by his wife had been that she had placed her trust in Mr. Cooper and that he had neglected the livestock without her knowledge, it is possible that, on these facts, Mr. Cooper was "substantially" affected from the point at which the police were to be taken as being aware of this assertion. One recalls, from the judgment of Campbell, LJ in R v Fegan & Ors. (2001)[11] that Mrs. McCullough's counsel, contending that his client was substantially affected once her husband was arrested, cited a passage from Eckle v Federal Republic of Germany (1982)[12]

> In this connection, the court does not deem it necessary, as the Government at one point seemed to have in mind, to draw any distinction between the two applicants, for although the investigation does not appear to have been directed against Mrs Eckle from the outset, she must have felt the repercussions to the same extent as her husband.

However, the point was not raised before me and, in any event, the material facts have not been sufficiently determined. What *is* contended on Mr. Cooper's behalf is that he was substantially effected by what passed between Const. Dougan and himself direct, that 27th July 2000.

In response to Mr. Cooper's remark about having contacted his solicitor, Const. Dougan "…pointed out the offence of causing unnecessary suffering to animals". Mr. Cooper declined to respond, citing both legal advice and medical treatment. Const. Dougan followed this by "…pointing out the offence of failing to bury carcasses of dead animals…", whereupon Mr. Cooper took his leave. However, as though to erase any doubt about the police intentions, Const. Dougan told Mr. Cooper at that point that the former was reporting him to the authorities "…with a view to prosecution

[11] At p. 6.
[12] Eckle v Federal Republic of Germany (1982) 5 EHRR 1, para. 74.

for the aforementioned offences and other related matters involving animals."

On those facts, and in accordance with my understanding of the authorities, I deem the relevant period, for the purposes of the Article 6(1) Convention right, as commencing no later than 27th July 2000 in Mr Cooper's case.

One then turns to consider how one is to go about determining whether the reasonable-time requirement has been breached in any particular case. I quote here the relevant part of para. 52 in the judgment of Bingham, L in Procurator Fiscal, Linlithgow v Watson and Burrows(2001)[13];

> But if the period which has elapsed is one which, on its face and without more, gives ground for real concern, two consequences follow. First, it is necessary for the court to look into the detailed facts and circumstances of the particular case. The Strasbourg case law shows very clearly that the outcome is closely dependent on the facts of each case. Secondly, it is necessary for the contracting state to explain and justify any lapse of time which appears to be excessive.

It is clear then that, upon the Court ruling that there is cause for enquiry, it falls to the State to explain and justify any excessive lapse of time. In this instance, so far as the Article 6(1) enquiry be concerned, the prosecution called no evidence before me. It relied instead entirely upon submissions.

It is well-established that in this kind of enquiry the Court must undertake careful consideration of the progress in the matter, from commencement of the relevant period. Since such an enquiry can only be fully informed by reference back to the initiation of the investigation, it is only right and proper that the parties, more particularly the prosecution, supply the Court and the other parties with a Schedule of events. In this case, a Chronology of Events was supplied by the prosecution, but it was incomplete, in that it commenced only with the arrival of the file within the DPP, on 21st September 2000.

Const. Dougan had been called to give evidence on behalf of the prosecution during the hearing of the applications to stay by reason of abuse of process. The only point I noted from his evidence, with reference to the time involved, was that he felt at the time that he was obliged to wait

[13] Procurator Fiscal, Linlithgow v Watson and Burrows; H.M. Advocate v JK Privy Council DRA No. 1 of 2001, delivered on 29th January 2002.

until he had attempted to interview Mr. Cooper before settling the file for transmission.[14]

All of the charges laid against each defendant are purely summary in nature. Constable Dougan confirmed in his evidence that he was aware of this. As I noted in the previous written ruling in this matter, the starting point, in regard to the relevant statutory provisions, was set out by Carswell, LCJ in *Re Molloy's Application.*[15]

> The time limit in respect of summary offences is fixed by art 19(1)(a)[16]:
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> > "Where no period of limitation is provided for by any other enactment – (a) a magistrates' court shall not have jurisdiction to hear and determine a complaint charging the commission of a summary offence other than an offence which is also triable on indictment unless the complaint was made within six months from the time when the offence was committed or ceased to continue …"

There is no requirement that an investigating officer must afford a suspect a right to be interviewed, before framing recommendations as to charges. Naturally, the police may have their own reasons for inviting a suspect to afford an interview; for one thing, the exercise may lead to incriminating statements or new lines of enquiry. These are essentially operational considerations, on the part of the police. Such considerations do not alter any obligation to make a decision to prosecute on the file within a period set by statute. Failure to secure an interview with the suspect, for whatever reason, does not constitute good reason to delay compliance with such a time limit.

As was also considered in some detail in my earlier ruling, this was a case in which the actual decision to prosecute was left with the DPP. It follows that, to be able to secure due compliance with the time limit contained in Art. 19(1)(a) of the 1981 Order, the police would have had to forward the file a reasonable time within the six-months time limit. In fact, although the Complaint was made just within the time allowed, the file was not so forwarded until after the expiry of the statutory limitation period altogether,

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[14] I pointed out in my written Ruling of 10th December last, at page 4, that Const. Dougan had previously been called, and examined, only in regard to the abuse of process application and that the separate matter of a possible breach of Article 6(1) was not being explored at that time. The prosecution were free to have him attend and give evidence at the Article 6(1) hearing but did not do so.

[15] *Re Molloy's Application* [1998] NI 78.

[16] The Magistrates' Court (Northern Ireland) Order, 1981.

thereby rendering it inevitable that the actual decision to prosecute would be in breach of that time limit.

In regard to all of this, it was merely asserted by the prosecution that; "This case was complex in that it involved cruelty charges to a large number of animals at two separate locations. Many of the animals had to be destroyed. The case involved video, photographic and documentary evidence. The case concerned numerous breaches of many different statutory regulations, Orders and Acts. The investigation was further hampered by the difficulties the police experienced in endeavouring to interview both Defendants. This was a case where the Department of the Director of Public Prosecutions sought the written advices of Counsel." These remarks, of course, address the total time taken, by police and DPP combined, to arrive at a definitive decision to prosecute (25th June 2001).

I happen to be dealing presently with a similar case in Omagh, one where likewise Department of Agriculture veterinary personnel come upon lands strewn with animal carcasses and call in the police. Evidence has to be captured and investigations carried out, much as here. Likewise, the case was prosecuted by the DPP. Nonetheless, the Summons in that case was issued some 5 months from date of detection. One might add that the investigation was completed without interview with the defendant.

In the final analysis, no evidence was called by the prosecution to support the assertion that this was a complicated case. With so much physical evidence littering the hillsides and the identity of the herd keeper easily ascertained, I am not persuaded that this can properly be so described. I know only from Const. Dougan's Statement that he was able to complete his interview with Mrs. Cooper on 29th June 2000. Earlier, on 17th April 2000, he had gathered in documentation on Mrs. Cooper's herd records. A Statement was recorded from Mr. John McConville, a Veterinary Officer with the Department of Agriculture and Rural Development (DARD) on 21st April 2000. Another had been taken from a Mr. Laurence Crilley, a Senior Animal Health and Welfare Inspector with DARD on 20th April 2000. One had been taken from Mr. David Harding, a Veterinary Surgeon as early as 17th March 2000. Another was taken from a Michael Gillen, USPCA Welfare Officer on 16th March 2000. Likewise from a Photographer, Ms. Shiela Millar on 16th March 2000. Indeed, I see nothing in the tendered evidence, nor was anything offered in evidence before me, which could explain the delay from March until mid-June 2000 when Mrs. Cooper was interviewed again. That interview seems merely to have been intended to afford Mrs. Cooper the opportunity to comment on the body of evidence which had in fact been pulled together by mid-April. It follows that I consider there to have been an unreasonable delay in forwarding

papers to the DPP, at or around 20th September 2000, with a view to securing a decision on prosecution. I believe, upon such evidence as was before me, that the police ought to have been able to forward the file to the DPP by mid-May, 2000, early June at the outside. I was not made aware of any material or probative line of enquiry being actively pursued after the interview with Mrs. Cooper could actually be completed, on 29th June.

Overall, I find that there was, in consequence, a delay of some 3 to 4 months at the stage of police investigations and file preparations, for which no satisfactory explanation was offered. None of this delay was in any way the fault of either Defendant.

The Chronology of Events filed by the prosecution begins with receipt of the file at the DPP Registry on 21st September 2000. The amended disclosure schedules followed from the police on 26th September 2000; and yet, as Mr. McNally pointed out, the disclosure schedules were not supplied to the defence until 20th June 2002. No explanation for that remarkable delay was offered. Nothing of significance seems to have been done on the file when a letter was received from Mrs. Cooper's solicitor on 16th October 2000, enclosing a letter and documentation from Mrs. Cooper's employers, and asking that any contemplated prosecution should be considered, with reference to the public interest, in light of the contents. Equally, nothing seems to have been done when a Psychiatric Report on Mrs. Cooper was received from her solicitors on 7th December 2000. The Report in question was dated 6th June 2000. I have been afforded an opportunity to peruse the Report. It certainly contains nothing by way of any facts upon which the decision to prosecute might be determined, evidentially. It simply goes to an issue as to whether, having regard to Mrs. Cooper's position as a Consultant Physician of high reputation and matters of mitigation, it was or was not in the public interest to proceed with a prosecution of her, individually.

It seems to me that, in point of fact, the responsible officer within the DPP did not commence effective work on the file until February 2001, some 5 months after it had been assigned to him. That month, he convened consultations and discussions with DARD representatives and, through their good offices, gathered in additional witness statements. On 22nd February 2001 that officer made recommendations to the Assistant Director, Southern Circuit as to prosecutions and draft Directions. I was left in little doubt that the officer had recommended a prosecution of Mr. Cooper alone.

In other words, more than 5 months after the police had filed a formal Complaint against Mrs. Cooper, the DPP had got as far as formulating an

internal recommendation that the prosecution against her should be abandoned. In the absence of any further information emanating from the prosecution, I take it that the recommendation was based on public interest and clemency considerations. It should also be noted, in passing, that, so far as Mr. Cooper be concerned, the actual decision to prosecute him had been deferred throughout that period until the (preliminary) fruition of representations on behalf of Mrs. Cooper alone. Neither he nor his representatives were involved in those representations. For him, it continued to be the case that he had not been approached again since the conversation on 27th July 2000.

The Assistant Director, Southern Circuit, on 27th February 2001, forwarded the file to a Senior Assistant Director. One does not know whether the Assistant Director added anything to the recommendations of his subordinate officer. The Senior Assistant Director, however, decided to seek the opinion of counsel. Counsel was to advise on whether there existed "a reasonable prospect of conviction of either Mr. Cooper or Mrs. Cooper in respect of each proposed charge." In other words, the DPP, corporately, remained undecided. We are, however, approaching 6 months from initial receipt of the file at the DPP – almost a full year since detection of the alleged offences – before one sets about definitive consideration as to the merits of prosecution of either defendant. Then again, one only has the written assertion of the subordinate officer, embedded with the text of the Chronology, that it was the "nature and complexity" of the case which required reference to counsel. For want of evidence, I am not able to determine if that was indeed the position, or if, in the alternative, the advices of counsel were required in order to "cover all bases", i.e., as a purely protective measure, prior to affirming the subordinate officer's recommendations. Mr. McAughey, BL consulted on 23rd March 2001 and his Opinion was received on 29th March, which was singularly expeditious.

Meanwhile, a telephone call from Mrs. Cooper's solicitor, Mr. Jones, on 28th March 2001 is recorded in the Chronology. It was asserted during submissions before me - and it was not refuted on behalf of the prosecution - that Mr. Jones was in fact in frequent contact by telephone to the DPP, enquiring as to what was happening. This particular call was significant, however, because Mr. Jones advised that, if his client (Mrs. Cooper) was to be prosecuted, he would want to submit further medical evidence [it was asserted that her medical condition had deteriorated between December 2000 and March 2001] and that he would want a "face-to-face" meeting to make further representations, before any such decision. The subordinate officer consulted with the Senior Assistant Director, who ruled that Mr. Jones should be afforded an opportunity to submit further medical evidence, although any additional representations ought to be in

writing. Upon this being relayed back to Mr. Jones, he said he would make written representations; that was 28th March 2001.

On 25th April, the subordinate officer spoke with Mr. Jones, who advised that he would be submitting further "medical report/representations" by 27th April. On 15th May, Mr. Jones advised that the additional medical report had not yet been received, but hoped to have it within a few days. On 18th May, a letter was received from Mr. Jones, announcing that no further documents would in fact be submitted, but renewing his request for an opportunity to make oral representations. On 24th May, a minute was sent to the Senior Assistant Director, who indicated, on 29th May, that Mr. Jones should in fact be allowed to make oral representations. On that same day, a letter was received from Mr. Jones, enclosing the Report dated 12th April, together with a further letter from Mrs. Cooper's employers dated 4th May.

The meeting with Mr. Jones took place on 4th June 2001. It does not appear to have achieved much. An internal memo was sent to the Senior Assistant Director, with (undisclosed) recommendations. A further memo went from the Senior Assistant to the Director himself on 8th June, noted on the 11th. Correspondence, for information purposes, with the solicitors for the USPA ensued and, on 25th June 2001, the Direction to prosecute both defendants was signed off. On 26th July 2001 a Summons was issued in respect of each defendant, pursuant to the Complaints made on 7th September 2000 (some 8 1/2 months earlier), returnable on 19th September 2001.

I find that there was unreasonable delay between 21st September 2000 and 9th February 2001, when the DPP officer assigned to the case began effective work on it, a fallow period of more than 4 months. The failure of the police to pass the file to the DPP within about 3 months from date of detection, which I have already identified, was compounded when the DPP officer then had to set about what I will treat as essential proofs in respect of the case against Mr. Cooper – gathering in additional relevant Statements. After somewhat less than 2 weeks thereby expended, the relevant officer did actually reach a determination, for his own part, as to what decision he should recommend to his superiors in respect of prosecution of each defendant. There was a further "mainstream" period expended in acquiring the opinion of counsel. Before then, and, more predominantly, thereafter, the source of delay was the approach from the solicitor acting for one of the defendants, urging the DPP to abandon prosecution of his client, Mrs. Cooper, for what might loosely be described as "public policy" considerations.

Hindsight tells us that the DPP did decide to prosecute both defendants, notwithstanding, in particular, the medical evidence adduced on Mrs. Cooper's behalf. So far as Mrs. Cooper was concerned, the proper course, in my view, was to reach the decision to prosecute by reference to the material supplied by the police, supplemented by an opinion from counsel if need be, issue the proceedings, and then consider whether (further) medical evidence warranted a withdrawal of the Complaint against Mrs. Cooper, with leave of the Court. With hindsight, I am not convinced that the notable latitude allowed to Mrs. Cooper's solicitor achieved anything but avoidable delay. It is a certitude that it achieved nothing but delay for her husband. Furthermore, the DPP continued to entertain the pleas for clemency, grounded on medical issues, from Mr. Jones until well after the decision to prosecute – right through to 9th April 2002, almost another 10 months.

I therefore conclude that the further delay from end-March 2001 until 26th July, another 4 months, was unreasonable. In summary, I find that of the 13 months taken to issue the Summons against Mrs. Cooper[17], or the 12 months or so as the equivalent period for Mr. Copper[18], some 10 or 11 months constituted unreasonable delay. On the evidence before me, the Summonses against each defendant could and should have been issued within about 5 months from 15th March 2000.[19]

It was submitted to me on behalf of the prosecution that it was merely a matter of fairness and decency that such time be afforded to Mrs Cooper. I must disagree. My approach is that, in summary cases at least, the prosecution are enjoined to reach their decision to prosecute within 6 months of detection of the alleged offence. Where there are substantive issues as to whether it be in the pubic interest to prosecute which do not lead to a withdrawal within that period, it is perfectly proper to continue to consider that issue - under the scrutiny of the judicial authorities[20]. What happened here, in contrast, was that the DPP withheld jurisdiction from the judicial authorities, by the withholding of summonses, while it made up its mind whether to prosecute. In so doing, it avoided submitting its conduct to independent scrutiny as to whether such continuing delays were, quite simply, taking up an unreasonable period of time.

[17] Counting from 16th June 2000.
[18] Counting from 27th July 2000.
[19] In stating this, I do not mean to suggest that 15th March 2000 constitutes the beginning of the relevant period, for the purposes of the Convention enquiry. I mean only to measure the net consequence of a proper observance of Convention obligations toward the defendants.
[20] After all, it is by no means unusual in these courts for cases to be withdrawn by the prosecution after several adjournments which have been permitted on the express basis that further representations by the defence are being considered.

Matters then moved into the court forum with the return date on the summonses, namely 19th September 2001. Just before that, however, on 10th September 2001, Mr. McNally wrote to the Central Process Office, seeking a copy of the Complaint and putting the prosecution on notice, even then, that an application to stay on the grounds of abuse of process would be made on behalf of Mr Cooper. On 19th September 2001 Mr McNally served Mr Cooper's Skeleton Argument, intended to ground an application for a stay upon what was described as abuse of process, but which was very largely on the ground of breach of the Convention right to a trial within a reasonable time, contrary to Article 6(1). On that date, the presiding Resident Magistrate indicated that he wished Mr Cooper's application for a stay to be heard as soon as possible and fixed 19th December 2001 provisionally for the trial. Mr Cooper's application for a stay was listed for 31st October 2001.

On 31st October, Mr Jones, with the consent of the DPP, applied for an adjournment of Mr Cooper's application. This was on the basis that Mr Jones was still engaged in discussions with the DPP and, further, that Mr. McAughey, BL, representing the DPP, was not available that day. I believe it is correct that it was a visiting Magistrate who agreed with the submission that applications by each defendant should be heard together.

On 9th November, a letter was received by Mr McNally from Mr Jones objecting to Mr Cooper's application for a stay being dealt with separately from that of Mrs Cooper. On 14th December, the matter was adjourned to 30th January 2002. On that occasion, the presiding Resident Magistrate ruled that Mr Cooper's application should be heard separately and adjourned to 6th February for a date to be fixed for hearing it.

On 31st January 2002 Mr Jones rang Mr McNally and advised that he would be attending Court on 6th February to object to a date being fixed for Mr Cooper's individual application. He did not do so. In the event, it was another solicitor who mentioned the matter on Mr Jones' behalf. The Magistrate on that occasion adjourned the matter to 6th March when it was intended (by the Magistrate) that a date be fixed for both applications to be heard. From there, in fact, it was adjourned to 20th March on Mr Jones' application.

On 20th March 2002, neither DPP nor Mr Jones attended. The presiding Resident Magistrate fixed 18th April for hearing of Mr Cooper's application. Mr McNally attended on that date, ready to proceed. It could not proceed because, again, there was no representative of the DPP in attendance. The visiting deputy Resident Magistrate adjourned the application again until 3rd May, indicating his expectation that it would proceed on that day. On 3rd

May, Mrs Cooper's representatives again persuaded the Court to adjourn. The Court granted an adjournment for the hearing of the applications on the basis that, should they prove unsuccessful, the trial should proceed on 20th and 21st June 2002.

On 20th June, Mr McAughey, BL appeared and moved an adjournment on behalf of the DPP. At that time, there was mention of the fact that primary disclosure had still not been made to the defence – 11 months after the summonses were issued and despite it being quite apparent at all times that the charges would be contested. On 25th June, primary disclosure was made to Mr McNally by fax, followed by receipt of the originals by post on 4th July. On 2nd July Mr McNally served a defence statement. On 3rd July, the Court fixed the hearing of the application for a stay on Mr Cooper's behalf for 6th and 13th September 2002. On 22nd July, Mr McNally wrote to the DPP, renewing his request for secondary disclosure and also for disclosure in relation to the application for a stay. The DPP replied, simply inviting Mr McNally to inspect the non-sensitive material, but refusing disclosure in respect of the stay application. No secondary disclosure was made. Further, the DPP suggested that Mr McNally write to Const. Dougan for relevant disclosure material. Mr McNally did so on 19th August. He received no answer. On 2nd September 2002 Mr McNally wrote to the DPP repeating his request for disclosure in the abuse of process application and for the prosecution's Skelton Argument. This was served upon him only on 13th September 2002, almost a full year after Mr McNally had set out Mr Cooper's legal submissions and authorities. (Indeed, it was not supplied to the Court until the morning of the abuse of process hearing itself, on 18th October 2002). Only then do efforts truly focus upon securing a mutually convenient date for hearing of the applications. It remains the case (to this day) that secondary disclosure has still not been made by the prosecution, pursuant to the defence served on 2nd July 2002.

One of the points made by Mr McNally was that, with secondary disclosure still to be made, and taking account of the delay on the prosecution's part in this respect to date, the likely time involved before this matter could come to trial was to be extended to include whatever period it might take before such secondary disclosure was actually effected. For my own part, I am not sure that this is entirely the correct approach.

Where the Court has embarked upon an enquiry as to whether the defendant's right to trial within a reasonable period has been breached one has to consider the total period involved, through to the likely trial date. In the case of <u>R (On the Application of Ahmed) v Birmingham Magistrates' Court</u> [2003] All ER (D) 80, Hooper J held that the District Judge had failed to consider the whole period of three years that would elapse before

the defendant was tried for dangerous driving. Accordingly, she had erred in her approach to determining whether the right to a trial within a reasonable time under art 6 of the European Convention on Human Rights had been infringed.

It is certainly correct in law, then, that I must come to an estimation, even if only provisional, as to when Mr Cooper is likely to have his trial commence, before deciding whether the total period thereby determined constitutes a breach of his Convention right. On the other hand, I do not think one can assume, for these purposes, that the trial of Mr Cooper will not proceed unless and until secondary disclosure has been made by the prosecution, nor should one overlook the fact that a defendant does have a remedy, in the face of either prevarication or plain refusal to make proper disclosure. Rule 7 of The Magistrates' Courts (Criminal Procedures and Investigations Act 1996)(Disclosure) Rules (Northern Ireland) 1997 sets out how the accused seeks an Order under Section 8 of the 1996 Act, compelling such disclosure.

I may say, though, that I find it most irregular that, upon Mr McNally requesting secondary disclosure (presumably on 2nd July 2002), the DPP should have refused to make disclosure concerning the abuse of process application, make no secondary disclosure and, above all, when pressed, should have referred Mr McNally to the investigating officer, Const. Dougan, on the subject. I have already made the point that counsel for the DPP made no attempt to rebut Mr McNally's account of these matters, both as set out in the his Chronology of Events and as recounted in open Court. The prosecution's Chronology does not assist either. Just as it only began with events on 21st September 2000, after the file had reached the DPP, so also it ends with a letter sent to Mrs Cooper's solicitor on 29th April 2002. There is therefore no written account given on the DPP's part about disclosure to Mr Cooper's solicitor. Indeed, the prosecution Chronology is one which, in any event, seems to have focused almost exclusively upon dealings in respect of Mrs Cooper. When the DPP's dialogue with her solicitors about her preoccupation finally draws to a close, so also does that Chronology. That serves, in its own way, to underscore how little attention was being paid by the DPP to the distinctive position and individual rights of Mr Cooper.

The Code of Practice under Part II of the 1996 Act makes it apparent that the practicalities and decisions in respect of disclosure are shared between prosecution and the disclosure officer (who may or may not be the investigating officer). Thus;

8.3 Section 9 of the Act imposes a continuing duty on the prosecutor. Any new material coming to light should be treated in the same way as the earlier material.

Certification by Disclosure Officer

9.1 The disclosure officer must sign and date a certificate to the prosecutor that to the best of his knowledge and belief, all material retained and made available to him has been revealed to the prosecutor under the Code. The certification must occur not only when the schedule and accompanying material is submitted to the prosecutor, but also when material is reconsidered after the accused has given a defence statement.

Disclosure of Material to Accused

10.1 If material has not already been copied to the prosecutor, and he requests its disclosure to the accused on the grounds that it qualifies for primary or secondary prosecution disclosure or the court has ordered its disclosure on application by the accused, the disclosure officer must disclose it to the accused.

10.2 Whether material copied to the prosecutor is to be disclosed by the prosecutor or the disclosure officer is a matter for agreement between the two of them.

10.3 The disclosure officer must disclose material to the accused either by giving him a copy or by allowing him to inspect it. If the accused asks for a copy of any material inspected, the disclosure officer must do so, unless on the opinion that is not practicable (e.g. an object which cannot be copied or the material is vol8minous), or not desirable (e.g. statement by a child about a sexual offence).

10.4 If the accused has inspected information recorded other than in writing, the form in which it is given is a matter for the discretion of the disclosure officer. He must ensure that any transcript is certified to the accused as a true record.

10.5 If a court rules that a sensitive item must be disclosed to the accused, it must be disclosed if the case is to proceed, but not necessarily in its original form: e.g., the court may agree that some details should be blocked out, or that documents may be summarised, or that the prosecutor may make an admission about the substance of the material under s.2 of the Criminal Justice (Miscellaneous Provisions) Act (NI) 1968.

The prosecutor in this case is the DPP, not the Police. Sub-sections (1) and (2) of Section 7 of the Criminal Procedure and Investigations Act 1996 makes plain that the duty to ensure secondary disclosure rests with the DPP, as prosecutor;

> 7. - (1) This section applies where the accused gives a defence statement under section 5 or 6.
>
> (2) The prosecutor must-
>
> (a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might be reasonably expected to assist the accused's defence as disclosed by the defence statement given under section 5 or 6, or
>
> (b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a).

Indeed, Section 10(4) also provides;

> (4) Subsection (5) applies at all times-
>
> (a) after the prosecutor complies with section 7 or purports to comply with it, and
>
> (b) before the accused is acquitted or convicted or the prosecutor decides not to proceed with the case concerned.
>
> (5) The prosecutor must keep under review the question whether at any given time there is prosecution material which-
>
> (a) might be reasonably expected to assist the accused's defence as disclosed by the defence statement given under section 5 or 6, and
>
> (b) has not been disclosed to the accused;
>
> and if there is such material at any time the prosecutor must disclose it to the accused as soon as is reasonably practicable.

If the relevant statutory provisions were being properly observed, the DPP in this case ought to have received copies of secondary disclosure material from the disclosure officer or, in the alternative, have directed the disclosure officer to disclose it direct to the accused, through his solicitor. It is, any event, only proper and professional for the accused's solicitor to deal with these matters through the offices of the DPP. It has not been suggested to me that no such material as is appropriate for secondary disclosure exists. For the DPP, in these circumstances, to simply re-direct Mr McNally to the investigating officer appears to be intended to do nothing else but to fob him off. In the absence of any effort by the DPP throughout the hearings before me to provide any alternative rationale, that is how I propose to treat it.

Section 10 of the 1996 Act provides;

> 10. - (1) This section applies if the prosecutor-
> (a) purports to act under section 3 after the end of the period which, by virtue of section 12, is the relevant period for section 3, or
> (b) purports to act under section 7 after the end of the period which, by virtue of section 12, is the relevant period for section 7.
> (2) Subject to subsection (3), the failure to act during the period concerned does not on its own constitute grounds for staying the proceedings for abuse of process.
> (3) Subsection (2) does not prevent the failure constituting such grounds if it involves such delay by the prosecutor that the accused is denied a fair trial.

Section 13(2) further provides;

> (2) As regards a case in relation to which no regulations under section 12 have come into force for the purposes of section 7, section 7(7) shall have effect as if it read-
> "(7) The prosecutor must act under this section as soon as is reasonably practicable after the accused gives a defence statement under section 5 or 6."

The prosecution has failed to act under Section 7 in this instance as soon as reasonably practicable. Section 10(2) makes clear that this may (at the Court's discretion) constitute grounds for staying the proceedings if such delay means that the accused has been denied a fair trial; in other words, that there has been prejudice.

This is, however, where on must return to the observation that Section 8 of the 1996 Act provides an accused, in such circumstances, with recourse to the Court for an Order compelling such secondary disclosure. In the final analysis, I do not think it appropriate to act upon any inferred prejudice so as to stay proceedings for abuse of process unless such an Order had been obtained and disregarded. So far as the mainstream enquiry under Article 6(1) be concerned, one can only conclude that there has been unreasonable delay on the part of the prosecution, for upwards of a year, in making

secondary disclosure and, in addition, compute that a matter of perhaps a couple of months more may well be added by virtue of the need for Mr McNally to secure and enforce such an Order.

Mr. Cooper, then, has been kept in a state of uncertainty about his fate since at least July 2000 until now. It is likely to take another 3 or 4 months for his trial to take place, should the prosecution be allowed to proceed from here. That means I approach further considerations on the basis that it will take something like 3 years and 4 months to afford him a trial on these summary charges in a Magistrates' Court.

In determining whether that period is unreasonable, and having scrutinised the events and conduct which account for it, I must also consider the complexity of the case and the conduct of the applicant. I set out earlier[21] my reasons for concluding that this was not a particularly complicated case. Equally, there was never any suggestion made to me that the applicant was to any degree responsible for the delays in this case. In all those circumstances, I conclude that there has been a clear breach of his right to trial within a reasonable time.

The current lead authority with respect to the appropriate remedy for such an inordinate delay is Attorney-General's Reference (No. 2 of 2001)[22]. The key passages were quoted by Gillen, J in R v Murphy (2001)[23];

> In the Attorney General's Reference (No 2) 2001 the Court of Appeal, whilst not rejecting the argument that the right to a trial within a reasonable period was an independent right, concentrated upon the question of whether it was necessary to order a stay where there had been a breach of the reasonable time guarantee. At para 20 of the judgment the Lord Chief Justice said:
>
> 'If a person complains of a contravention of the reasonable time requirement in Article 6 and if the court comes to the conclusion that there has been a contravention, then at the request of the complainant the court is required to provide the appropriate remedy. If the court is willing and able to provide the appropriate remedy, then the court is not compelled to take the course of staying the proceedings. That is a remedy which the court can grant, but it is certainly not a remedy which it is required to grant. It seems to us in general that the approach that previously existed as to the provision of the remedy of staying the proceedings should be confined, as it was prior to the Convention becoming part of our domestic law, to situations which in general terms can be described as amounting to an abuse of the process of the courts. But there are many other actions which the court can take which avoids the need for such action. In particular, if the court comes to the conclusion that this would provide the appropriate remedy, the court can mark the fact that the way the prosecution has been conducted does contravene the reasonable time requirement in Article 6(1) and acknowledge the rights of the defendant by so doing. In many cases the court will come to the conclusion

[21] Above, page 9.
[22] Attorney-General's Reference (No. 2 of 2001) [2001] UKHRR 1265
[23] R v Murphy (GILC3553 Unreported judgment of Gillen, J delivered on 20th December 2001), pages 13 *et sequi.*

that that is not a sufficient recognition of the defendant's rights. If that be so, the court can then take other action. It can, for example, take account of the failure to proceed with the case with due expedition in the sentence which the court imposes. It has always been the practice for the courts in this jurisdiction to take into account delays of the sort to which we have referred when sentencing a defendant. It does so, recognising that it is inevitably a disadvantage to a defendant to have a charge hanging over his or her head longer than is reasonably required. The criminal process inevitably subjects an individual to distress. Albeit that they are acquitted at the end of the process, they will have been subjected to unnecessary distress. The difference which the Human Rights Act 1998 makes is that the remedies available to a court can be greater than they were hitherto. In particular it is now in appropriate circumstances open to the courts to make awards of compensation.'

The court went on to say at para 21:

'There is a certain amount of authority on this subject. However there is no authority which supports the conclusion that a stay is the appropriate remedy except in limited circumstances where it is no longer possible for a defendant to have a fair trial bearing in mind the ability of the court to exclude evidence or to take other action to achieve a fair trial. If a fair trial is not possible, then a stay would have to be imposed. Equally it would be appropriate to stay proceedings if the situation is one where it could be said that to try the accused would in itself be unfair.'

This reasoning has been the subject of criticism in an interesting article by Alastair Webster QC in Criminal Law Review October 2001. The resolution of this issue may be a matter for further consideration and I venture to suggest that the last word has not been said on the subject. I should not wish sitting at first instance to attempt to affect that resolution in circumstances where this case, in light of the finding I have made, does not affirmatively require it. I am reinforced in my caution by the approach of Lord Hope of Craighead in Magill v Porter who observed at para 15:

'In view of the conclusion which I have reached I do not need to deal with the respondent's submissions about the remedy to which they were entitled if there had been undue delay. Schiemann LJ said "… that it would have been appropriate in that event to quash the auditors certificate. He had in mind the remedy which was available in the Divisional Court to ensure that, despite the delay, there was a fair trial and the possibility instead of a remedy in damages. The appellant supported this approach. But these are difficult issues and I would prefer to reserve my opinion on them." '

It should also be noted here, though, that the Court of Appeal in Attorney-General's Reference (No. 2 of 2001) did qualify its position somewhat in the following passage[24];

> But we are not prepared to say that there cannot be circumstances (which at the present time we are unable to identify) where, notwithstanding the absence of prejudice, it can be said that it would [not] be appropriate for a trial to take place. To that extent we therefore give a qualified negative answer to the first question.

In the case of Mills v HM Advocate and The Advocate General for Scotland [2002] UKPC D2 Lord Steyn observed;

[24] At para. 24.

18. In Dyer v Watson 2002 SLT 229, 251, para 121 Lord Hutton explained:

> "The judgments of the European Court, as I read them, suggest that where there has been unreasonable delay in breach of article 6(1) the court does not take the view that a conviction after such delay must automatically be quashed. In Bunkate v The Netherlands [(1993) 19 EHRR 477] the court found that there had been unreasonable delay in violation of article 6(1) and then stated (p 484, para 25):
>
> 'The applicant's claims are based on the assumption that a finding by the Court that a criminal charge was not decided within a reasonable time automatically results in the extinction of the right to execute the sentence and that consequently, if the sentence has already been executed when the Court gives judgment, such execution becomes unlawful with retroactive effect.
>
> 'That assumption is, however, incorrect. The Court is unable to discern any other basis for the claims and will therefore dismiss them.
>
> 'And in X v Federal Republic of Germany the Commission stated (1980) 25 DR 144, para 2 in respect of a claim to stay the proceedings:
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> 'Insofar as the applicant claims a right to discontinuance of the criminal proceedings in view of the long delays which had occurred, the Commission considers that such a right, if it could at all be deduced from the terms of article 6(1) would only apply in very exceptional circumstances. Such circumstances did not exist in the applicant's case'."

Lord Hutton is right: it was wrong to say that the normal remedy is the quashing of the conviction.

At one point in the other substantive judgment grounding the unanimous decision of the Board, Lord Hope observed;

51. The approach which I would take to the question which has been raised in this appeal is first to identify the remedy which would ordinarily be thought to be appropriate in domestic law for a breach of the kind which has taken place, and then to consider whether the remedy which has thus been identified would achieve just satisfaction for the breach as indicated by the jurisprudence of the European Court. I think that it is important to start with the position in domestic law because, as was emphasised in Eckle v Federal Republic of Germany 5 EHRR 1, 24, para 66, the Convention leaves to each contracting state, in the first place, the task of securing the enjoyment of the rights and freedoms which it enshrines. The machinery of protection established by the Convention, of which article 50 forms part, is of a subsidiary character.

> 52. In a case of pre-trial delay, for example, one of the remedies which is available in domestic law is to uphold the accused's plea in bar of trial. This was familiar ground long before the coming into effect of the Scotland Act 1998. It is available under the common law where there is such a grave risk of prejudice at the trial due to undue delay that no direction by the trial judge can be expected to remove it; see McFadyen v Annan 1992 JC 53; Normand v Rooney 1992 JC 93. It is available also where the point is taken as a devolution issue under the Scotland Act, for which purpose it is not necessary for the person charged to show that he has suffered, or will suffer, any actual prejudice: Dyer v Watson, K v HM Advocate 2002 SLT 229, 245I-J, para 79. In K v HM Advocate, where a breach of the article 6 guarantee was established, the Board held that to dismiss the indictment was the only appropriate course in the circumstances. As Lord Rodger of Earlsferry said, at p 262K, para 182, it was, in the circumstances of that case, the only effective remedy. But different considerations apply where the delay has occurred between the date of a conviction and an appeal. There is no precedent in domestic law for the setting aside of a conviction which has been upheld on appeal as a sound conviction on the ground that there was an unreasonable delay between the date of the conviction and the hearing of the appeal.

I was also referred in argument before me to the more recent Privy Council case of "R" v HM Advocate and The Advocate General for Scotland PCDRA3 of 2002, delivered on 28th November 2002. In his dissenting judgment, Lord Steyn stated, at para. 15;

> Lord Woolf CJ [in Attorney-General's Reference (No 2 of 2001)] stated that in cases of pre-trial breach, where a fair trial was still possible, the appropriate remedy will normally be a lesser remedy than a stay: p 1876, para 20. Lord Woolf concluded pp 1877-1878, (para 23):
>
> > "If there has been prejudice caused to a defendant which interferes with his right to a fair trial in a way which cannot otherwise be remedied, then of course a stay is the appropriate remedy. But in the absence of prejudice of that sort, there is normally no justification for granting a stay."
>
> This decision is strong authority against the decision of the majority in the present case. In *Mills (No 2)* it was unnecessary to consider *Attorney-General's Reference No 2 of 2001:*2002 SLT 939,945, para 21. In the present case however, the decision has a bearing on issues before the Privy Council. Despite the fact that the point will come before the House of Lords on appeal the Privy Council cannot ignore it. Subject to re-examination by the House of Lords, it authoritatively states the law of England. I will be guided by the views of Lord Woolf CJ and the other members of the Court of Appeal.

So far as direct authorities within this jurisdiction be concerned, Weatherup J delivered a Ruling on 16th October 2002 in the case of R v Hughes[25]. The

[25] Unreported.

applicant had been arrested in March 1997 and had his first trial in March 1998. The jury disagreed and a second trial took place in May 1998, when he was convicted. However, he appealed that conviction and, in October 1998 the Court of Appeal ordered a re-trial. The third trial took place in April 1999 and he was again convicted. Again the applicant appealed and the matter was heard in the Court of Appeal in June 2000. Judgment was given in September 2000, when a further re-trial was ordered. His arraignment in that regard did not take place until February 2002 and directions for a transcript were given in March 2002. It was found that not all transcripts were available and Weatherup J found the matter before him, some 2 years since the re-trial was ordered. The learned Judge, following Attorney-General's Reference (No. 2 of 2001), found there to be a breach of the reasonable time requirement, but that a stay was not the appropriate remedy. It could be dealt with, for example, by a reduction in sentence (in the event of conviction) or possibly an award of compensation.

In the course of his reasoning, at pages 7 and 8, Weatherup J pointed out the following;

> I have also been referred to Dyer v Watson, a decision of the Privy Council on a devolution issue from Scotland, reported in 2002, Scottish law times at 229. This was an application concerning a breach of the reasonable time requirement. At paragraph 33 of the judgment I draw attention to the dual rights that arise under the convention under Article 5(3) relating to reasonable detention and being concerned with the right to liberty, and Article 6(1) relating to reasonable time and being concerned with the rights of trial. The difference between them is referred to in paragraph 33:
>
> "… there is no confusion between the stipulation in Article 5(3) and that in Article 6(1). The latter provision applies to all parties to court proceedings and its aim is to protect them against excessive procedural delays; in criminal proceedings especially, it is designed to avoid that a person charged should remain too long in a state of uncertainty about his fate.
>
> Article 5(3) for its part refers only to persons charged and detained. It implies that there must be special diligence in the conduct of the prosecution of the cases involving such persons. Already in this respect the reasonable time mentioned in this provision may be distinguished from that provided for in Article 6."

And from page 9;

> In the light of that case I believe that the four propositions I set out as arising after the Attorney General's reference of 2001, remain valid. The Privy Council illuminates the path to a breach of the reasonable time requirement. It is apparent from the decision that the appropriate remedy may be a stay if there is prejudice to the defendant affecting a fair trial. Otherwise the remedy *may be* other than a stay. (*my emphasis*)

Weatherup J then went on to recount how the Privy Council, in Procutator Fiscal, Linlithgow v Watson and Burrows reasoned that there was no

breach of the reasonable time requirement in respect of the adult police officer, never remanded in custody, in one of the pair of cases under consideration, whereas it came to the opposite conclusion the respect of the other matter, a child defendant in a case involving child victims[26].

> The position, however, was quite different in relation to the other case that involved children, and it was noted that while the child defendant was not in custody, the United Nations Convention on the rights of the child and the Bejing rules required prosecution with all due diligence, and that is a much stricter requirement [than] the reasonable time requirement which does not demand all due diligence. They found on consideration of the case that there were difficult judgments to be made in assessing the strengths of the testimony given by very young victims, and in deciding whether to prosecute, a feature which echoes in this case. They found that the relevant period for which they required explanation was the concluding 11months of the process when they expected urgency to be demonstrated in the treatment of the case and found that there was no attempt to treat the case with the urgency which it undoubtedly deserved at that time. There was no satisfactory explanation for the delay.

It should be borne in mind, though, that the Board's decision in Procurator Fiscal, Linlithgow v Watson and Burrows was reached in circumstances where it had been taken as axiomatic below that, upon a finding of a breach of the reasonable time requirement, the only appropriate remedy was a stay.[27]

Another instance where the threshold for breach of the reasonable time requirement under Article 6(1) was found to be lower than in the generality of cases, by reference to extraneous but complementary coda, is to be found in the Ruling of the Recorder of Belfast, in the case of R v A, McC and W (2001)[28] Unreported Ruling delivered on 3rd April 2001. There, the applicants contended that:-

(a) It was an abuse of process for the DPP to prosecute the defendants, having stated at an earlier point that they would not be;
(b) The defendants had been prejudice by the delay; and
(c) There had been a breach of the right of the defendants to a trial within a reasonable time, under Article 6(1).

The learned Recorder found against the defendants on point (a). On point (b), the Recorder found for McC alone and granted him a stay under the common law doctrine of abuse of process. He refused remedy to both A and W under that doctrine because no prejudice to a fair trial could be shown in their case. He then turned to point (c) in respect of the remaining

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[26] Arising in the paired case of HM Advocate v "JK".
[27] See the judgment of Lord Bingham, para. 65 *et sequi.*
[28] Unreported Ruling, delivered on 3rd April 2001.

application on behalf of those two, first confirming, following Crummock (Scotland) Ltd v HM Advocate (2000)[29], that it was not necessary to show prejudice to a fair trial, in order to establish breach of the reasonable time requirement, an approach which I respectfully consider to be now well-settled.

The learned Recorder had this to say[30] on the question of variable standards;

> The importance which Article 6(1) places upon the defendant not remaining too long in a state of uncertainty about his fate is a general principle which has to be applied in the light of all the circumstances of the case, and it may be that differences in the criminal justice systems of individual jurisdictions result in differences in emphasis as to what may be thought to be reasonable. Thus what Lord Bonomy referred to in HM Advocate v Hynd (unreported 9.5.00) as "the strict timetable for bringing those in custody to trial, including the renowned 110 day rule", which applies in Scotland does not have an equivalent in this jurisdiction.
>
> Nevertheless, in Northern Ireland there is recent and statutory confirmation of the need to avoid delay in the case of criminal proceedings against children. Article 4(b) of the Criminal Justice (Children) (NI) Order 1998 provides – "In any proceedings for an offence, the court shall have regard to (b) the general principle that any delay in dealing with a child is likely to prejudice his welfare."

The Recorder went on from there to adopt what he described as a "purposive and generous interpretation of "proceedings""

> Mr Hanna Q.C. suggested that a distinction should be drawn between "welfare" and the fairness of the trial, but I think that is too narrow a view because Article 4(b) is expressed in terms which must apply to every aspect of the criminal process, including pre-trial delay.

If I understand this correctly, the Recorder did not rule that the DPP's delay had created prejudice to a fair trial. Rather, he found that it prejudiced the welfare of the children, A and W – and/or would do so, if the proceedings were allowed to continue. Indeed, he had earlier ruled explicitly that the delay had not occasioned prejudice for A and W in respect of the prospect of a fair trial, in the orthodox sense of that term. If that is right, then the learned Recorder's ruling is one where he found there had been a breach of the reasonable time requirement and that the appropriate remedy was a stay, notwithstanding the fact that such delay had not prejudiced a fair trial. His decision to grant a stay was instead arrived at by reference to the particular diligence required by statute in cases involving child defendants. Consideration of this kind of prejudice (to welfare) was of particular importance, but was not decisive. The issue had to be

[29] Crummock (Scotland) Ltd. v HM Advocate [2000] JC 408
[30] At page 29.

considered in the round and by reference to whether, in all the circumstances, the situation created by the delay is such as to make it an unfair employment of the powers of the court any longer to hold the defendant to account.[31] Ultimately[32], he arrived at the conclusion that the delay constituted both an abuse of process at common law and a breach of the reasonable time requirement under Article 6(1) and also ordered a stay in respect of the remaining two defendants.

For present purposes, I propose to treat R v A, McC and W as an instance where an Article 6(1) breach was found to warrant a stay even though no prejudice to a fair trial had been found, by reason of an extraneous statutory standard within our domestic law, requiring special diligence on the part of the relevant authorities and in respect of a particular class of defendants. True, alternative remedies of a reduction of sentence, or compensation in the event of acquittal, were not expressly considered by the learned Recorder, but it seems to me to be implicit in the approach which he adopted that neither of these would have adequately met that particular standard and the need to uphold it.

A more recent treatment of these issues is to be found in the unreported judgment of Campbell, LJ in the case of R v Coleman & Ors. (2003)[33]. That was a case involving charges arising from serious public disorder on the Shankill, Belfast, on 19th August 2000. The various defendants were arrested and first appeared on remand on a number of dates between October and November 2000. A direction to prosecute was given on 20th August 2001. It was not a particularly complicated set of charges, although the learned Judge ruled that a period of 10 months to the point where a preliminary enquiry could be held was not unreasonable. There were then a series of adjournments of a mixed committal in the case of one defendant, some of these, especially at first, necessitated because there was no video equipment available in Court. The preliminary enquiry only took place on 29th November 2002 and the defendants were returned for trial at Belfast Crown Court on 6th December 2002. The ultimate trial was scheduled to begin no later than 9th June 2003. It was found that there had been a breach of the reasonable time requirement by the judicial authorities. Attention then turned to the question of the appropriate remedy.

> [19] Counsel on behalf of the defendants submit that where before trial such a breach has been established the only remedy that is appropriate is an order staying the proceedings. They rely on section 6(1) of the Human Rights Act, which makes it unlawful for a public authority including the court to act in a way which is incompatible

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[31] Cf. page 31.
[32] At page 34.
[33] R v Coleman & Ors. (2003) (Unreported Judgment of Campbell, LJ in the Crown Court, delivered 23rd May 2003; CAMF3934.

with the Convention rights of the accused. So they contend where there has been a breach to allow the prosecution to proceed would be to act unlawfully.

[20] A similar argument was advanced in *Attorney General's Reference (No 2 of 2001)* [2001] I WLR 1869 (currently under appeal to the House of Lords). There an indictment was stayed in the Crown Court on the ground that there had been a breach of Article 6(1). The judge took the approach that to proceed to try a defendant where there has been unreasonable delay would result in the court acting in a way that was incompatible with the defendant's rights. Thus the court had to stay the proceedings. The Court of Appeal rejected this view and at paragraph 20 of his judgment Lord Wolff said:

> "If the court is willing and able to provide the appropriate remedy, then the court is not compelled to take the course of staying proceedings. That is a remedy which the court can grant, but it is certainly not a remedy which it is required to grant."

Lord Wolff went on to say that the court could take account of the failure to proceed with due expedition in the sentence that it imposes. Where a person is acquitted it *could* be appropriate for compensation to be paid.

[21] The jurisprudence of the European Court on the subject of remedies for a breach of the reasonable time provision has to be read with some circumspection. Lord Millet said in *Dyer* (at paragraph 129) that the European Court has repeatedly held that unreasonable delay does not automatically render the trial or sentence liable to be set aside because of delay, provided that the breach is acknowledged and the accused is provided with an adequate remedy for the delay for example by a reduction in sentence. He added (at paragraph 131) that the question of the appropriate remedy is of little practical importance in the European Court, which is not obliged to grant a remedy once a breach of a Convention right has been established. In addition it has to be remembered that the European Court is almost invariably dealing with cases where the trial has already taken place.

[22] Subject to these considerations it is significant that in the article 50 proceedings in *Eckle* A65 (1983) the Court said (at paragraph 20) that the earlier finding that the length of the proceedings against the defendants was unreasonable did not:

> "In any manner hold or imply that their prosecution, conviction and imprisonment was also in breach of the Convention".

[23] van Dijk and van Hoof in Theory and Practice of the European Convention on Human Rights 3rd Ed. at p 450) write:

> "Article 6(1) does not stipulate what the consequences for the proceedings are, if the reasonable time requirement has not been met. It would seem to ensue from this provision that, if the reasonable time has been exceeded and, consequently, the determination can no longer be made within a reasonable time, the proceedings would have to be stopped and the civil action or criminal charge to be declared inadmissible. However the Strasbourg organs have adopted a more flexible view."

[24] An example is found in *H v Germany* D&R 27 (1982) of a case where the national court held that the applicant's right to a trial within a reasonable time had been violated and decided that this was not a reason to discontinue the proceedings. There the Commission regarded redress by way of mitigation of sentence by the national court as adequate.

[25] In *HM Advocate v R (PC)* [2003] 2 WLR 317 there was undue delay. The appellant was not seeking a remedy under the Convention or the Human Rights Act but relying on section 57 of the Scotland Act 1998 which prevents the Lord Advocate from doing any act that is incompatible with Convention rights. In a dissenting opinion on the central issue in the case, Lord Steyn said (at paragraph 11):

> "The width of the reasonable time guarantee is relevant to the separate question of the remedies for a breach. There is no automatic remedy. ……domestic courts have available a range of remedies for breach of the reasonable time guarantee. In a post conviction case the remedies may be a declaration, an order for compensation, reduction of sentence, or a quashing of a conviction: *see Mills v HM Advocate* [2002] 3 WLR 1597,1604, para 16. In a pre-conviction case the remedies may include a declaration, an order for a speedy trial, compensation to be assessed after the conclusion of the criminal proceedings, or a stay of proceedings. Where there has been a breach of the reasonable time guarantee, but a fair trial is still possible, the granting of a stay would be an exceptional remedy."

[26] Section 8(1) of the Human Rights Act provides:

> "In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate."

In the present case there is no suggestion that a fair trial of the defendants on the charges brought against them is no longer possible. The right to a trial within a reasonable period is an important one but so is the public interest in prosecutions for serious offences continuing to a proper conclusion and not being brought to a premature end.

[27] It is apparent from the authorities, to which I have referred, that where there is a breach of the right to a trial within a reasonable time there is no correlative right not to be subjected to a trial. In the circumstances of the case, balancing the interests of the defendants with those of the public, in my judgment, it is just and proper that the trial should continue as soon as possible. At the conclusion of the trial, when the length of the proceedings will be known, the judge can review the adequacy of the remedy of an early trial and decide if any additional remedy is required.

[28] There remains to be considered the case advanced on behalf of Coleman that his trial should be stayed at common law. It is an established principle that the court cannot stay a prosecution at common law unless the defendant can show that he would suffer serious prejudice if a stay is not granted - *Attorney General's Reference (No1 1990) [1992] QB 630.* In the absence of evidence of any prejudice this submission must fail.

I have already found, in Mr Cooper's case that the delay in reaching a decision to prosecute and in serving a Summons upon him constitute a breach of the reasonable time requirement. In addition, I find that the failure of the authorities to afford him a hearing of his application in this regard until 18th October 2002 compounded the primary breach. Mr Cooper's behaviour has not contributed to these delays in any way and I

discern no particular complexity which might be taken to account for the delays in question.

As I approach the question as to the appropriate remedy for these breaches, I bear in mind that this is an enquiry into what is to be considered "just and appropriate". To afford a stay of proceedings would be exceptional, the last option. The authorities, as they presently stand, have made clear on several occasions that other options, to be afforded first consideration, include the following;

1. The simple declaration that there has been such a breach;
2. Arrangements to secure expedition of the trial date;
3. A reduction in sentence, in the event of conviction;
4. An award of compensation, in the event of acquittal;

I have no difficulty in concluding that a mere declaration that there has been a breach of the reasonable time requirement would not be just, in all the circumstances.

I do not believe that to simply take steps to expedite trial would adequately reflect, on its own, the extent of the breach in this instance.

The levels of compensation typically awarded in the European Court of Human Rights far exceeds anything likely to be imposed upon Mr. Cooper in the event that he were convicted and that the appropriate penalty were determined to be a fine. If a proper level of compensation substantially exceeds anything likely to be imposed upon the applicant by way of a fine, in the event of a subsequent conviction, then it seems to me to be inappropriate to put him to a trial at all, unless something more than a fine is to be taken as the likely disposal upon conviction, having regard to the seriousness of the offence in question. I have had recourse to the European Court in this regard, because I am not aware of any reported case within the United Kingdom, more particularly within Northern Ireland, where a person, found to have suffered a breach of his Convention rights, subsequently acquitted at trial, was later granted monetary compensation. I need hardly add that a Magistrates' Court has no power to award such compensation and the scenario in question involves contemplating Mr Cooper being acquitted at trial and then having to embark upon separate proceedings, the precise form of which, I must confess, is not clear to me.

The charges against Mr Cooper are entirely summary in nature. Where case law, for example, contemplates reductions by several months to a prison sentence, by way of proper redress for a breach of Article 6(1), there is no

likely prison sentence which is to be expected in Mr Cooper's case, upon a conviction, which could accommodate such a dispensation.

All these considerations go to illustrate a basic point: summary proceedings in a Magistrates' Court cannot accommodate inordinate delay on the hypothesis that any breach of the Convention right may be taken to be remediable by way of a reduction in sentence. It may work out that way in some instances – each case must be decided on its own facts – but there is another core consideration which tilts me the more strongly toward the final and exceptional step.

The clear intention behind Article 19(1)(a) of The Magistrates' Courts (Northern Ireland) Order, 1981[34] is that summary proceedings should be commenced within 6 months of detection of an alleged offence. Properly speaking, to commence proceedings entails a decision to do so, not a mere "intention" to do so. I see noting in the judgment of Re Molloy's Application[35] which says otherwise.

Re Molloy's Application did not in any way disapprove the statements of both law and principle previously enunciated in Maguire v Murray [1979][36]. I have already detailed[37] the regret expressed by Lord Lowry in that case that the Court could not stay proceedings, in exercise of its discretion, for such abuse of process, where it was not shown that the prospects of a fair trial had been adversely affected. It is already quite clear, I believe, that it is not necessary for such prejudice to be found in order to establish a breach of the reasonable-time requirement under Article 6(1) of the Convention, as now incorporated into domestic law by The Human Rights Act 1998. Where such prejudice is found to arise, that is strongly indicative of such a breach, but it is not a prerequisite. When it comes to the separate question of remedies for such a breach, my view, based on my understanding of the authorities, is that the grant of a stay of proceedings, though exceptional, remains an option at the discretion of the Court, where it has determined that it is required as the "just and appropriate" remedy.

I now turn to the position of Mrs Cooper. As with her husband's case, having determined that there is cause for enquiry, I must first determine whether there has been a breach of her Convention right to trial within a reasonable period, counting from June 2000. In that regard, I have to consider the complexity of the case, the conduct of Mrs Cooper, the progress of the investigations and the conduct of the judicial authorities.

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[34] See above, page 8.
[35] Re Molloy's Application [1998] NI 78
[36] Maguire v Murray [1979] NI 103.
[37] In my Ruling herein dated 10th December 2002, page 19.

For reasons which I do not propose to reiterate, I proceed on the basis that this was not a particularly complex case. Further, the investigations in respect of Mrs Cooper were completed with perfectly reasonable expedition.

Turning to Mrs. Cooper's conduct, this did not in any way contribute to what I would describe as the core delay, in the failure to have made a decision to prosecute within the 6-month period. Likewise, the efforts by Mrs Cooper's solicitor to intervene, in an effort to persuade the authorities that it was not in the public interest to proceed, did not actually contribute to the delay from 21st September 2000 until 22nd February 2001, when the DPP officer made his recommendations to the Assistant Director, to the effect that Mrs Cooper should not in fact be prosecuted. There was no evidence adduced before me, to the effect that the officer was waiting for that letter from her solicitor which was received on 16th October 2000; neither was there any evidence adduced to the effect that the officer decided from there to wait until receipt of the follow-up Psychiatric Report, which was actually received on 7th December 2000. Bearing in mind that it is for the prosecution authorities to justify any delay, I find that the DPP officer would not have started addressing the file until February 2001, whether or not anything had been received on Mrs Cooper's behalf. The officer concerned was not called to give evidence before me and I have to proceed in the absence of his explanations.

It will be recalled that the file went up to the Senior Assistant Director, who decided that the opinion of counsel should be obtained. This milestone coincided with receipt of the request from Mrs Cooper's solicitor that, if a decision to prosecute his client were to be made he would want to submit further medical evidence and to be afforded a meeting. In response, the Senior Assistant Director decided that Mr Jones should be allowed to submit further medical evidence. In the context of a summary process, I did attempt to elicit some explanation for that decision. I appreciate it may well have been contended that Mrs Cooper's psychiatric condition had deteriorated between December 2000 and March 2001, but I believe that the DPP already had everything they needed in order to make their decision to prosecute.

The prosecution authorities were enjoined to reach their decision to prosecute within 6 months of knowledge of the alleged offence. The file had arrived with the DPP only after that period had already expired. The DPP had failed to exercise the special diligence which would be required to repair that delay so as to legitimately expect that a court might exercise its discretion in the event of an abuse of process application, should prejudice

be asserted. Further, by taking another 6 months, in a purely summary case, in order to arrive at a point where a decision whether to prosecute was finally in prospect calls very much in question whether a stay was inappropriate, in the event of an application grounded upon the Article 6(1) reasonable time requirement. That is the context in which it is put to me that, really, it was a balanced and difficult judgment as to whether to step back from the decision and take further representations on Mrs Cooper's behalf and that the decision to do so was reasonable. In this context, one recalls the precept enunciated by Bingham, L in Procurator Fiscal (Linlithgow) v Watson and Burrows (2001);

> 54. The second matter to which the court has routinely paid regard is the conduct of the defendant. In almost any fair and developed legal system it is possible for a recalcitrant defendant to cause delay by making spurious applications and challenges, changing legal advisers, absenting himself, exploiting procedural technicalities, and so on. A defendant cannot properly complain of delay of which he is the author. But procedural time-wasting on his part does not entitle the prosecuting authorities themselves to waste time unnecessarily and excessively.

I do not consider that the initiative taken by Mrs Cooper's solicitor in March 2001 could be characterized as spurious, or as exploiting procedural technicalities. As with Mr Cooper, I consider that it remains the fault of the prosecuting authorities that the decision to prosecute Mrs Cooper was not made until 25th June 2001 and, indeed, that the Summons was not actually issued until 26th July 2001, more than 16 months after detection of the alleged offences.

If applications had been made on behalf of each defendant and heard on 19th September 2001 I consider that the only proper course would have been to grant a stay and I see no good reason, based upon some exact apportionment of blame between defendant, prosecution and judicial authorities in respect of what came to pass between September 2001 and October 2002 to decide otherwise at a subsequent stage and in respect of either defendant.

In this respect, so far as Mrs Cooper be concerned, her representatives continued in the perfectly legitimate endeavour of trying to persuade the prosecution authorities to review their decision, through to April 2002, when the final medical investigation, facilitated by the prosecution, came to a conclusion. The import of all information available to me is that, between September 2001 and April 2002 (another 7 months' delay), the prosecution and Mrs Cooper's representatives worked in concert to keep back any progress in the matter before the Court. So far as Mrs Cooper's role in this

be concerned, one of the guiding precepts in this field, it will be recalled, is that a defendant is not to blamed for using all remedies available, even if this prolongs delay. The way in which the prosecution authorities permitted those medical enquiries to drag on, all the while holding out to Mrs Cooper the tantalizing prospect of a determination that the case against her might be withdrawn, was one which, once again, paid little or no regard to the duty placed upon them to proceed with special diligence.

In the case of each defendant, considered at September 2001, there had been an irreparable breach of the right to a trial within a reasonable period, in the context of the special diligence required. In consequence, the reasonable time requirement under Article 6(1) of the European Convention has to be interpreted in the domestic context, where a tight schedule has been set by Parliament for such summary proceedings. I would most respectfully associate myself with the spirit of the remarks penned by the late Lord Lowry in Maguire v Murray [1979] in his closing paragraphs. There was here, in a way which was much more blatant than on the facts found in Re Molloy's Application [1998], what one might term a non-actionable abuse of process at common law. The Human Rights Act, 1998, coming into effect in October 2001, expanded the courts' responsibilities considerably. It is no longer a matter of considering only whether there remains the prospect of a fair trial, notwithstanding such delay, with respect to affording remedy. Further, if, as here, the Court feels that it is simply not right, not just, having considered all lesser remedies, that the case should be allowed to continue then it is now empowered to afford a stay, even though such delay has not prejudiced the prospect of a fair trial.

The Police in this case seem to have known quite well that these were summary offences, but appear to have proceeded on the basis that to file a Complaint, based on reasonable suspicion, within the 6 months period was all that was required by the law, in order to vouchsafe the jurisdiction of the Magistrates' Courts. When that is combined with the failure on the part of the DPP to prioritise the file, one has an institutionalized disregard of the fundamental character of summary prosecutions.

I have no doubt, based on the medical evidence put before me, that Mrs Cooper, in particular, went through agonies of mind, far beyond the consequences of mere uncertainty as to her position, as a result of facing the prospect of prosecution. In a medical report of 11th April 2001 it is recorded that she had expected this whole matter would have been dealt with by Christmas 2000 but that its hanging on had prevented any form of normal life. In the last such report, dated 11th March 2002 it was found that "…the duration of legal proceedings has contributed to the onset and to

the perpetuation of her depressive illness." The law never intended that so much should be visited upon anyone by reason of the system's delays in a summary prosecution. Mrs. Cooper has lived with that exceptional level of stress for well over 3 years. It has threatened on occasion to break her spirit entirely.

For these reasons, I grant a stay to both defendants.

Dated this 30th June 2003

John I Meehan, RM
Newry Petty Sessions